

Exhibit "3"

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
San Francisco Division

IN RE SUBPOENA TO:
REDDIT, INC.

Case No. 3:23-mc-80037-LB

**ORDER DENYING MOTION TO
COMPEL AND QUASHING
SUBPOENA**

Re: ECF No. 1

INTRODUCTION

The plaintiffs in an out-of-district case are owners of motion-picture copyrights who claim that RCN, an internet-service provider, is liable for its subscribers' infringing those copyrights because RCN ignores piracy on its network. *Bodyguard Prods., Inc. v. RCN Telecom Servs. of Mass., LLC*, No. 3:21-cv-15310 (D.N.J.). In this case, the plaintiffs subpoenaed non-party Reddit for identifying information for eight Reddit users' accounts and then moved to compel Reddit's compliance after Reddit objected. The users at issue posted comments over the years that, according to the plaintiffs, support the plaintiffs' claims. Reddit contends that there is no need for the discovery that outweighs the users' First Amendment right to speak anonymously online. The court denies the motion to compel and quashes the subpoena because on this record, the First Amendment bars the discovery.

1 **STATEMENT**

2 The plaintiffs are fifteen producers of popular motion pictures.¹ The defendants are internet-
 3 service providers RCN Telecom Services, LLC and RCN Telecom Services of Massachusetts,
 4 LLC. They are based in New Jersey and “operate[] as a single, integrated company[] under the
 5 RCN brand.”² RCN is, in turn, one of several internet-service providers that “are managed by the
 6 same group in Princeton, NJ under the brand Astound.”³

7 The plaintiffs own the copyrights to thirty-two motion pictures that, they allege, are pirated on
 8 a massive scale by the defendants’ subscribers.⁴ The plaintiffs further allege that “[m]any of
 9 [RCN’s] subscribers are motivated to subscribe to RCN’s service because it allows them to
 10 download movies and other copyrighted content — including unauthorized content — as
 11 efficiently as possible.”⁵ The plaintiffs sent over 5,400 notices informing RCN that many of its
 12 subscribers were “utilizing [RCN’s] service to infringe” the plaintiffs’ works. But RCN allegedly
 13 “persistently turned a blind eye to the massive infringement . . . occurring over [its] network.”⁶
 14 The plaintiffs’ remaining claims are for contributory copyright infringement, vicarious copyright
 15 infringement, and secondary liability for Digital Millennium Copyright Act violations.⁷

16 *Bodyguard Prods., Inc. v. RCN Telecom Servs., LLC*, No. 321CV15310GCTJB, 2022 WL
 17 6750322, at *1 (D.N.J. Oct. 11, 2022).

18 Non-party Reddit “is a community of online communities.” In those communities, which are
 19 called “subreddits,” users discuss shared interests, and they generally do so anonymously.⁸

20 _____
 21 ¹ First Am. Compl. (FAC), No. 3:21-cv-15310 (D.N.J.) – ECF No. 22 at 3–5 (¶¶ 7, 9–23). Citations
 22 refer to material in the Electronic Case File (ECF); pinpoint citations are to the ECF-generated page
 numbers at the top of documents. Citations are to the ECF of the present case unless the underlying
 case is specified.

23 ² *Id.* at 5 (¶¶ 24–27), 6–7 (¶ 38).

24 ³ Culpepper Decl. – ECF No. 1-1 at 2 (¶ 6).

25 ⁴ FAC, No. 3:21-cv-15310 (D.N.J.) – ECF No. 22 at 3 (¶¶ 6, 8); Motion Picture List, Ex. A to *id.*, No.
 3:21-cv-15310 (D.N.J.) – ECF No. 22-1.

26 ⁵ FAC, No. 3:21-cv-15310 (D.N.J.) – ECF No. 22 at 7 (¶ 40).

27 ⁶ *Id.* (¶ 43).

28 ⁷ *Id.* at 26–28 (¶¶ 158–71), 30–32 (¶¶ 184–202).

⁸ Schottlaender Decl – ECF No. 9 at 2 (¶ 3).

On January 7, 2023, the plaintiffs served a subpoena on Reddit for the identifying information for nine Reddit user accounts.⁹ The plaintiffs contend that these users posted comments on Reddit over the years that constitute evidence relevant to this case.¹⁰ The comments are about RCN, internet-service providers, and copyright-infringement notices from internet-service providers.¹¹

On January 17, 2023, Reddit objected to the subpoena, including on the ground that the subpoena “implicates the First Amendment right to anonymous speech.”¹² Reddit later provided the identifying information for one user (“ben125125”) after giving that user notice.¹³ Reddit also gave notice to the other users. The plaintiffs withdrew their request for one user (“dotsamantha”).¹⁴ Thus, the comments of seven users are at issue. (The comments are discussed in the analysis below.)

All parties consented to magistrate-judge jurisdiction.¹⁵ The court held a hearing on April 27, 2023.

ANALYSIS

A party that served a subpoena may, “on notice to the commanded person, . . . move the court for the district where compliance is required for an order compelling production.” Fed. R. Civ. P. 45(d)(2)(B)(i). The plaintiffs thus move to compel Reddit to produce the identities of its users who are the subject of the plaintiffs’ subpoena. The issue is whether that discovery is permissible despite the users’ right to speak anonymously under the First Amendment. The court denies the motion because on this record, the First Amendment bars the discovery.

⁹ Culpepper Decl. – ECF No. 1-1 at 3 (¶ 12); Subpoena, Ex. 1 to *id.* – ECF No. 1-2.

¹⁰ Mot. – ECF No. 1 at 4–5 (¶ 15).

¹¹ Reddit Comments, Ex. 3 to Culpepper Decl. – ECF No. 1-4.

¹² Culpepper Decl. – ECF No. 1-1 at 3 (¶ 13); Letter, Ex. 2 to *id.* – ECF No. 1-3.

¹³ Culpepper Decl. – ECF No. 1-1 at 4 (¶ 15); Schottlaender Decl – ECF No. 9 at 3 (¶ 7).

¹⁴ Schottlaender Decl – ECF No. 9 at 3 (¶ 7).

¹⁵ Consents – ECF Nos. 15, 17.

1. Legal Standard

The First Amendment protects the right to anonymous speech. *Art of Living Found. v. Does 1–10*, No. 10-cv-05022-LHK, 2011 WL 5444622, *3 (N.D. Cal. Nov. 9, 2011) (citing *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 342, (1995)). That right is not absolute, though. *Id.* at *4. When third-party providers such as Reddit receive subpoenas to produce identifying information of posters of anonymous speech, the court applies the appropriate First Amendment standard to ensure that a person’s right to anonymous speech is protected. *Music Grp. Macao Com. Offshore Ltd. v. Does*, 82 F. Supp. 3d 979, 983 (N.D. Cal. 2015); *In re Frontier Co.*, No. 19-mc-80184-LB, 2019 WL 3345348, at *3 (N.D. Cal. July 25, 2019) (citing *Wilens v. Doe Defendant No. 1*, No. 3:14-cv-02419-LB, 2015 WL 4606238, at *15 (N.D. Cal. July 31, 2015), *R. & R. adopted*, No. 5:14-cv-02419-LHK, 2015 WL 5542529 (N.D. Cal. Sept. 18, 2015)); *see also In re Anonymous Online Speakers*, 661 F.3d 1168, 1172–77 (9th Cir. 2011). In addition to engaging in the relevant legal analysis, the court routinely conditions the subpoena on notice to the customer and an opportunity to be heard. *See, e.g., UMG Recordings, Inc. v. Does 1–4*, No. 06-0652 SBA (EMC), 2006 WL 1343597, at *3 (N.D. Cal. Jan. 31, 2006).

In *Anonymous Online Speakers*, the Ninth Circuit reviewed the developing tests in the area of anonymous online speech. 661 F.3d at 1174–77. The court left it to the discretion of district courts to choose the proper standard in a given case, based on the nature of the speech at issue. *Id.* at 1176–77; *see, e.g., Art of Living*, 2011 WL 5444622, at *5 (“[I]n choosing the proper standard to apply, the district court should focus on the nature of the [defendant’s] speech[.]”) (cleaned up); *SI03, Inc. v. Bodybuilding.com, LLC*, 441 F. App’x 431, 431–32 (9th Cir. 2011) (same). “For example, . . . commercial speech should be afforded less protection than political, religious, or literary speech[.]” *Anonymous Online Speakers*, 661 F.3d at 1177.

In “evaluating the First Amendment rights of anonymous Internet users in the context of a third-party civil subpoena,” district courts have followed the approach taken in *Doe v. 2TheMart.com*, 140 F. Supp. 2d 1088 (W.D. Wash. 2001). *Rich v. Butowsky*, No. 20-mc-80081-DMR, 2020 WL 5910069, at *3–4 (N.D. Cal. Oct. 6, 2020); *Anonymous Online Speakers*, 661 F.3d at 1176 (describing the *2TheMart.com* test). Under that approach, disclosure of anonymous

users’ identities is appropriate only “in the exceptional case where the compelling need for the discovery sought outweighs the First Amendment rights of the anonymous speaker.” *2TheMart.com*, 140 F. Supp. 2d at 1095. Courts consider four factors: whether “(1) the subpoena seeking the information was issued in good faith and not for any improper purpose, (2) the information sought relates to a core claim or defense, (3) the identifying information is directly and materially relevant to that claim or defense, and (4) information sufficient to establish or to disprove that claim or defense is unavailable from any other source.” *Id.*; *Rich*, 2020 WL 5910069, at *3–4. The factors are weighed “based on the circumstances of a given case.” *Rich*, 2020 WL 5910069, at *4; *Sines v. Kessler*, No. 18-MC-80080-JCS, 2018 WL 3730434, at *13 n.16 (N.D. Cal. Aug. 6, 2018).

The plaintiffs contend that the applicable standard is that stated in the copyright-infringement case *In re DMCA § 512(h) Subpoena to Twitter, Inc.*, because that is the standard Reddit relied on in its original objection to the subpoena and because “copyright law includes built-in First Amendment accommodations such as the fair use defense.”¹⁶ 608 F. Supp. 3d 868, 876 (N.D. Cal. 2022). But Reddit’s original objection raised the First Amendment argument, and the court has discretion to choose the applicable standard. *Anonymous Online Speakers*, 661 F.3d at 1176–77. As for copyright law, the fair-use defense is available only to those accused of copyright infringement, and the Reddit users at issue here are uninvolved third parties. In *In re DMCA § 512(h) Subpoena to Twitter*, by contrast, the target of the subpoena was accused of copyright infringement. 608 F. Supp. 3d 868 at 874; *see In re DMCA Subpoena to Reddit, Inc.*, 441 F. Supp. 3d 875, 882–83 (N.D. Cal. 2020) (rejecting “the application of the First Amendment to anonymous online speech” under the circumstances because “the First Amendment does not protect anonymous speech that infringes copyright”).

¹⁶ Reply – ECF No. 16 at 3–5 (¶¶ 4–6).

2. Application

Reddit argues that there is no compelling need for the discovery that outweighs the Reddit users' First Amendment rights, because under the *2TheMart.com* factors, the subpoena seeks information that is irrelevant to the underlying case and is available from other sources.¹⁷ The plaintiffs contend that three of the Reddit users' comments are relevant, the court should modify the subpoena as to the other four users so that the parties may first determine whether they are customers of the Astound group (of which RCN is a part), and only Reddit has the information the plaintiffs seek.¹⁸ As for relevance, the plaintiffs argue that the Reddit users' comments fall into three categories of relevance:

(i) Comments that establish that RCN has not reasonably implemented a policy for terminating repeat infringers sufficient for a safe harbor affirmative defense as required by 17 U.S.C. § 512; (ii) Comments that establish that RCN controls the conduct of its subscribers and monitors its subscribers' access; and (iii) Comments that establish that the ability to freely pirate without consequence was a draw to becoming a subscriber of RCN.¹⁹

Crucially for purposes of this subpoena, the plaintiffs have not shown that "the identifying information is directly and materially relevant to [a core] claim or defense" or that "information sufficient to establish or to disprove that claim or defense is unavailable from any other source." *2TheMart.com*, 140 F. Supp. 2d at 1095. This is a "high[]" standard." *Anonymous Online Speakers*, 661 F.3d at 1176. As to four of the users — "SquattingCroat," "aromaticbotanist," "ilikepie96mng," and "Griffdog21," who all responded to a thread about Comcast — the plaintiffs admit that they don't know whether the users were RCN customers. SquattingCroat said "I have received like 20 [copyright-infringement notices] in the past couple of years from my [internet-service] provider, [but] literally nothing ever happened."²⁰ The user aromaticbotanist did not mention RCN and merely said they "work for a national ISP."²¹ Ilikepie96mng did not mention

¹⁷ Opp'n – ECF No. 8 at 7–15.

¹⁸ Mot. – ECF No. 1 at 4–8 (¶¶ 15–25); Reply – ECF No. 16 at 5–10 (¶¶ 7–15).

¹⁹ Mot. – ECF No. 1 at 4–5 (¶ 15).

²⁰ Reddit Comments, Ex. 3 to Culpepper Decl. – ECF No. 1-4 at 2.

²¹ *Id.* at 3.

RCN and referred to “our ISP.”²² Griffdog21 likewise didn’t mention RCN, and the context suggests that the comment was about Comcast.²³ Comments like these are not “directly and materially relevant to [a core] claim or defense” in this case — if they are relevant at all.

As to all of the users, there is information available from another source to establish or disprove the plaintiffs’ three alleged categories of relevance. Specifically, RCN is the party that (according to the plaintiffs) “has not reasonably implemented a policy for terminating repeat infringers,” “controls the conduct of its subscribers,” and allows its customers “to freely pirate without consequence.” The high likelihood that this information is available from RCN defeats the plaintiffs’ subpoena (which was issued at the start of discovery in the underlying case).

The plaintiffs’ arguments about other users’ comments do not change the result.

The user “compypaq” said that RCN would sometimes remotely reset his modem.²⁴ The plaintiffs contend that this comment helps show that RCN can monitor and control its customers’ conduct, because the ability to reset a modem implies the ability to turn off a modem.²⁵ This argument only reinforces that the plaintiffs can obtain the information they seek from RCN. It isn’t necessary to subpoena the identities of RCN customers from a third party to determine whether RCN can disable its customers’ internet access.

The user “matt3324” commented that RCN can redirect its customers’ internet browsers to particular webpages in some circumstances.²⁶ The plaintiffs argue again that this comment shows RCN’s ability to monitor and control its customers.²⁷ But the plaintiffs can determine from RCN the extent to which it can control its customers’ browsers.

In a thread by a user considering whether to switch to RCN and asking whether RCN sends “copyright infringement emails from torrent monitors,” the user “ChikaraFan” said: “Seems

²² *Id.* at 5.

²³ *Id.* at 6–7.

²⁴ *Id.* at 5.

²⁵ Reply – ECF No. 16 at 5–6 (¶ 7).

²⁶ Reddit Comments, Ex. 3 to Culpepper Decl. – ECF No. 1-4 at 8.

²⁷ Reply – ECF No. 16 at 6 (¶ 8).

1 extremely rare if ever. RCN seems fairly lax...no data caps. I looked up before I switched and had
 2 little trouble.”²⁸ The plaintiffs contend that this shows that RCN did not implement a counter-
 3 infringement policy and that customers are drawn to the ability to freely pirate on RCN’s
 4 network.²⁹ Of all the comments at issue here, this is the closest call.

5 On the one hand, it is logical for the plaintiffs to obtain evidence from RCN’s customers in a
 6 case about whether those customers are drawn to RCN’s allegedly “lax” counter-infringement
 7 policies. And it may be logistically challenging to identify customers in that group. *Cf. Metro-*
 8 *Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 929–30 (2005) (“When a widely
 9 shared service or product is used to commit [copyright] infringement, it may be impossible to
 10 enforce rights in the protected work effectively against all direct infringers, the only practical
 11 alternative being to go against the distributor of the copying device for secondary liability on a
 12 theory of contributory or vicarious infringement.”). But ChikaraFan was apparently drawn to
 13 RCN’s lack of “data caps,” which is another technical issue that can be illuminated by discovery
 14 from RCN itself. Even as to the issue of customers being drawn to RCN, the question here is
 15 whether the information is available from “any” other source. It is implausible that this one (First
 16 Amendment protected) user is an irreplaceable source. Finally, as Reddit points out, ChikaraFan’s
 17 comment predates RCN’s conduct at issue in this case, thus raising doubt that ChikaraFan’s
 18 comment is “directly and materially” relevant. *2TheMart.com*, 140 F. Supp. 2d at 1095.

CONCLUSION

21 The court denies the plaintiffs’ motion to compel. This resolves ECF No. 1.

22 **IT IS SO ORDERED.**

23 Dated: April 28, 2023



LAUREL BEELER
United States Magistrate Judge

27 ²⁸ Reddit Comments, Ex. 1 to Mot. for Leave – ECF No. 22-1 at 2.

28 ²⁹ Reply – ECF No. 16 at 7–8 (¶ 11).